Pope, to the Reverend Moon, to Madalyn Murray O'Hair, and to *all* others (religionists and anti-religionists)" *O'Hair* v. *Andrus,* 613 F.2d 931 (D.C.Cir. 1979).

Petitioners would additionally submit that a distinction can also be made between University "lawns" and "open areas" on the one hand and "public streets and parks" on the other. Again, the *Wolin* criteria make clear that these university areas under examination are devoted primarily to secular education. They are areas designed to facilitate the movement from one area of the campus to another. They are designed to aesthetically contribute to and support the secular education function and the many activities which that function encompasses. They are designed to provide a quiet place to review an assignment, prepare a lesson, or take a breather between, before or after classes. However, these campus areas are not generally considered to be areas open to all for all unrestricted purposes. The lawn and other open areas of a public university are not, and should not be, generally considered by anyone to be the real equivalent of a park and all that that term envisages.

B. A Public College Or University Is Not Required To Make Its Facilities Available For Purposes Of Regular Religious Worship Services Or Regular Religious Teaching Sessions Even If Its Buildings Or Grounds Are Determined To Be Public Forums.

In their dissent to the denial of Petitioners' Motion for Rehearing, Circuit Judges Bright and McMillian expressed their opinion on this topic as follows:

> "We entertain considerable doubt that cases which permit *expression of political and religious views* in public places require that state institutions make its [sic] facilities available for denominational religious services." *Chess* v. *Widmar,* 635 F.2d 1310, 1321-1322 (8th Cir. 1980). (Emphasis Added). See also Pfeffer, Church State and Freedom, page 682 (Beacon Press, rev. ed. 1967).

Petitioners concur and would respectfully submit that a careful reading of the opinions which have characterized locales as public forums reveals "...that their characterizations were always qualified, indicating that not every conceivable form of public expression would be protected." *Greer* v. *Spock,* 424 U.S. 828, 859, 96 S. Ct. 1211, 1228, 47 L. Ed. 2d 505 (1976).

Petitioners submit that the cases relied upon by the Eighth Circuit, and the cases which will undoubtedly be cited in support of Respondents' position are all either (1) cases dealing with areas traditionally viewed and considered as being open for "communicating thoughts between citizens and discussing public questions" and for use in "communication of views on national questions." *Hague* v. *CIO,* 307 U.S. 496, 515-516, 59 S. CT. 954, 964, 83 L. Ed. 1423 (1939), i.e. "...the streets, sidewalks, parks and other similar public places...." *Grayned* v. *City of Rockford,* 408 U.S. 104, 117 92 S. Ct. 2293, 2304, 33 L. Ed. 2d 222 (1972); or (2) cases actually concerned with the rights of free speech, press and/or assembly...not the dangers of the establishment clause.[18]

A case falling within the first grouping is, of course, *O'Hair* v. *Andrus,* 613 F.2d 931 (D.C.Cir. 1979). There should be no dispute that the National Mall area, because of its strategic location, and past historical usage, has become an area associated with protests, complaints, demonstrations, vocal out pourings

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[18]"Although some of the "Jehovah Witness" cases do speak in terms of *free exercise of religion,* Petitioners submit this was an unnecessary afterthought. As one author has written, "...the turn towards free exercise seems accidental. It simply made their opinions and articles sound better to include references to freedom of religion. The Witnesses were, after all, very unpopular people. The only thing about them with which conventional Americans could identify was their use of the language of Christianity. ***Against the background of events in Europe in the late '30's and '40's, religious freedom was a popular thing; why not get a bit of mileage out it by linking it with speech in protecting the embattled Witnesses." Morgan, *The Supreme Court and Religion,* pp. 73-74. (The Free Press 1972).

of outrage or concern. It is a open "park area" treated as such, and in fact, administered by the National Park Service. This area had previously been used for "religious activities." *O'Hair, supra,* 613 F.2d at 934, where the Court also indicated that about 100 permits per year were issued for such activities. Nevertheless, in spite of these facts, Judge MacKinnon was perceptive to the potential for constitutional abridgement.

> ". . . it cannot be concluded that because permits are issued for widely separated special events the government would thereby to be forced to issue permits for such activities on a *regular* basis. In other words, authorizing special events of a religious nature on widely separated occasions is one thing so far as the establishment clause is concerned and *to do so on a regular basis is another thing."* O'Hair, 613 F.2d at 938 (MacKinnon, Jr., concurring). (Emphasis Added).

The case of *Gilfillan* v. *City of Philadelphia,* 637 F.2d 924 (3rd Cir. 1980), also dealing with the Pope's historic 1979 visit to America, is interesting. Although use of the public city plaza for this special "pastoral mission" of the Pope was not challenged, the Court determined that the expenditure of funds to construct a platform and provide for certain other extraordinary assistance was an unconstitutional establishment.

The case of *Saia* v. *New York,* 334 U.S. 558, 61 S. Ct. 1148, 92 L. Ed. 1574 (1948) dealt with free apeech and whether or not the requiring of a permit for a loudspeaker or amplifier violated that right. While Saia was a minister of the Jehovah's Witnesses, there was no indication that he was conducting religious services, but only that he was giving *speeches* "on religious subjects." Furthermore, while the Court held the ordinance involved unconstitutional, the Court's subsequent decision in *Kovacs* v. *Cooper,* 336 U.S. 77, 69 S. Ct. 448, 93 L. Ed. 513 (1949) does not leave *Saia* intact. See *Nietmotko* v. *State of Maryland,* 340 U.S. 268, 280, 71 S. Ct. 325, 332, 95 L. Ed. 267 (1951) (Frankfurter, J., concurring). In that case, the Court did

not deal with the issue of whether religious groups could be excluded from the use of the public park because the evidence was that permits had "always" been issued for religious organizations and Sunday School picnics. *Nietmotko, supra,* 340 U.S. at 272-273, 71 S. Ct. at 328. In light of this, it was no wonder that exclusion of only the Johovah's Witnesses was found improper. *Kunz* v. *New York,* 340 U.S. 290, 71 S. Ct. 312, 95 L. Ed. 267 (1951), was another "free speech" case dealing with a "traditionally open" area and whether or not Kunz could speak without a permit, required by a city ordinance, prior to holding a religious meeting on the streets of New York. The Court said no after reviewing cases dealing with the usage of streets and parks. *Kunz, supra,* 340 U.S. at 293-295, 71 S. Ct. at 314-315. In *Tucker* v. *State of Texas,* 326 U.S. 517, 66 S. Ct. 274, 90 L. Ed. 274 (1946), the Court dealt with door to door visits in a village operated by the Federal government. *Tucker* did not discuss in any way the Establishment Clause, See also *Marsh* v. *State of Alabama,* 362 U.S. 501, 66 S. Ct. 276, 90 L. Ed. 265 (1946). The case of *Spartacus, Etc.* v. *Board of Trustees of Illinois,* 502 F. Supp. 789 (N.D.Ill. 1980), held that the student union and outdoor walkways on the campus of the University of Illinois-Chicago Circle were "public forums." However, the case only dealt with the distribution of literature. Religion, or the establishment provision, was not involved in any way. Furthermore, the Court did acknowledge that the university areas *were* different than ". . .other types of public forums." *Spartacus, supra,* 502 F. Supp. at 799. Petitioners would submit these cases are not authoritative because of the glaring absence of establishment clause consideration.

Unfortunately, it cannot be said in this case that the ". . . freedom asserted by. . .[Respondents] does not bring them into collision with rights asserted by any other individual." *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624, 630, 63 S. Ct. 1178, 1181, 87 L. Ed. 1628 (1943). The right of many, many others would clearly be infringed if the desired meetings were permitted in this case. . . and, just as important-

ly, the wall of establishment, so clearly conceptualized and designed, would, in the opinion of Petitioners, suffer a dangerous crack.

CONCLUSION

"Under our system the choice has been made that government is to be entirely excluded from the area of religious instruction and churches excluded from the affairs of government. The Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice, and that while some involvement and entanglement are inevitable, lines must be drawn," *Lemon* v. *Kurtzman,* 403 U.S. 602, 625, 91 S. Ct. 2105, 2117, 29 L. Ed. 2d 745 (1971). Petitioners respectfully request that the Supreme Court "draw the line" in this case to indicate that the activities which Respondents seek to hold, with University aid and assistance, and the implicit approval of religion which results therefrom, are beyond the "verge" of constitutional power.

Petitioners submit that their brief indicates clearly that the University regulations under challenge in the case at bar and the actions of Petitioners in reliance thereon were constitutionally proper and therefore Petitioners respectfully ask that the judgment and opinion of the Eighth Circuit Court of Appeals in the case at bar be reversed and that judgment and opinion of the Federal District Court for the Western District of Missouri be ordered affirmed in its entirety.

Respectfully submitted,

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No. 80-689

In the Supreme Court of the United States

October Term, 1980

GARY E. WIDMAR, ET AL.,
Petitioners,

vs.

CLARK VINCENT, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENTS

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QUESTIONS PRESENTED

1. Does the refusal of the University of Missouri to accommodate voluntary student religious meetings, when all other student meetings are accommodated, violate the religious students' rights of equal access to a public forum protected by the Fourteenth Amendment?

2. Does the refusal of the University of Missouri to accommodate student religious meetings unconstitutionally abridge freedoms of speech, association, and exercise of religion?

3. Does the First Amendment Free Speech Clause protect voluntary, non-official religious speech by private individuals on public property to the same extent as speech dealing with secular subjects?

4. Would a state university's neutral policy of accommodating the activities of various special interest groups, without discriminating against religious actvities, constitute a violation of the Establishment Clause?

5. Does a policy of discrimination against student religious activities on campus violate the Establishment Clause by having a primary effect of inhibiting religion, while tending to involve the state in excessive entanglement with religion?

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STATEMENT OF THE CASE

The University of Missouri, founded in 1839 and acknowledged as the oldest land grant college west of the Mississippi River, is a single state-wide University with four campuses, accommodating a total credit enrollment of some 53,151 students[1] from all racial, ethnic, and religious backgrounds. The University operates on an annual budget of over 360 Million Dollars,[2] offering programs leading to graduate, post-graduate and professional degrees.[3]

The total enrollment for the Kansas City campus (hereafter called UMKC) for the 1980-81 school year is 11,283[4], over 4,600 of whom are over 25 years of age.[5]

Students come to the University for various reasons, expecting the University to offer opportunities for education, personal development, broadening of outlook, and training for a career.[6] UMKC has responded to the needs of its students for extracurricular and cocurricular activities by accommodating the many (over 100) and varied autonomous special interest groups recognized by the University.[7]

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1. *The Facts - 1981* (University of Missouri System, 1981)

2. Brief of Petitioners, page 34, footnote 14.

3. Undergraduate Catalogue, UMKC, 1979-81 Edition, p. 10.

4. *The Facts - 1981* (University of Missouri System, 1981)

5. 1980-81 *Student Handbook*, UMKC, p. 5.

6. *Id.*, p. 12. It is suggested in the *Student Handbook* that there are four primary reasons for attending the University: 1) To get an education; 2) To learn about oneself; 3) to "finish school rapidly and get a career going"; and 4) to "meet people, have a good time, and develop yourself as a person." *Ibid.*

7. At the time this case was filed in the District Court (in 1977) there were over 90 recognized special interest groups. A. 43. (All references to the Joint Appendix herein are cited as "A. ___."). Presently, there are over 100 such groups. 1980-81 *Student Handbook*, p. 12.

The University concedes that it is important that the students' "social, cultural, entertaining, and service needs" be met though opportunities provided by the University.[8] The office of Student Life is "dedicated" to administering a wide range of cultural, social, educational, and recreational programs at UMKC.[9] Lectures, films, club sports, symposia, concerts, wilderness outings, seminars, domestic and international trips, Communiversity,[10] and student publications represent just a few of the many cocurricular and extracurricular programs which students plan and in which they participate.[11] The University boasts that "these programs provide an added dimension to the student's academic experience since they offer a valuable opportunity for personal development and growth in the area of interpersonal skills, social consciousness and leadership ability."[12]

The Office of Student Life is housed in the University Center, which is "dedicated to serving the social, cocurricu-

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8. The University acknowledges that if the University did not provide opportunities for such extracurricular needs, the needs would "go unmet." A. 43.

9. 1980-81 *Student Handbook*, UMKC, p. 10.

10. Communiversity is described in the *Student Handbook* as a "free university, funded by both the ASA [All Students Association] and the community." "It is an opportunity for students to become involved in both nontraditional studies and community affairs. Teachers (conveners) are all volunteers. There are no grades, no tuition, and no credits granted, and students help create their own learning environment." 1980-81 *Student Handbook*, p. 14. Communiversity also sponsors some events which appear to deal with religious subject matter. For instance, on December 3, 1977, Communiversity sponsored "Awakening—a film about Śri Chinmoy, Indian Spiritual Master." Admission was free, and the film was shown in Haag Hall Annex on the campus. *University News*, Volume 15, No. 11, November 17, 1977.

11. 1980-81 *Student Handbook*, UMKC, p. 10.

12. *Ibid.* The *Undergraduate Catalogue* also states that UMKC is "dedicated to extending the learning experience beyond traditional boundaries and to thinking in terms of education transcending the traditional concept of classroom and campus." 1979-81 Edition, pp. 10-11.

lar and cultural needs of UMKC".[13] The University Center at UMKC operates on annual budget of over 1 Million Dollars, about one-fourth of which comes from the student activity fees.[14] Most of its operating capital is derived from profit on food and vending machine services.[15]

Consistent with the cosmopolitan atmosphere of a public university, the Chancellor of UMKC states that the "open campus" has long been a traditional policy at UMKC.[16] The freedom "to demonstrate in an orderly fashion as a means of presenting views" also is recognized by the University, since "freedom of expression is one of the hallmarks of a democratic society."[17]

At issue in this case is the regulation of the University, applicable to all campuses, prohibiting the use of the buildings and the grounds of the University for purposes of "religious teaching" and "religious worship" by student or non-student groups.[18] This regulation was construed in this case to forbid the accommodation of student meetings on religious subjects where there is Bible exposition and an "atmosphere of worship".[19] University authorities further construed the rule to prohibit even an informal, small group Bible Study on the University lawn.[20] Although adopted in 1972, the regulation was not enforced against

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13. A. 39.

14. A. 45.

15. *Ibid.*

16. "Open Campus Statement," Chancellor George A. Russell, appearing in 1980-81 *Student Handbook*, UMKC, p. 10.

17. *Ibid.*

18. The entire regulation is set out at A. 29. In spite of the reference in the regulation to chapels on campus, there is no chapel at UMKC, although there is one at the Columbia campus, 125 miles east of UMKC.

19. A. 27.

20. A. 21-22, A. 27.

Cornerstone students until the start of the spring semester in 1977,[21] even though Cornerstone had been recognized as a student organization, and had been meeting on campus for religious purposes, for 4 or 5 years.[22]

The Cornerstone students are evangelical Christian students from different denominational backgrounds having common convictions about the truth and inerrancy of the Bible and the applicability of the scriptural commands to bear witness of Jesus Christ as God,[23] to teach the truth of the Bible[24] and to join together for individual growth through group worship and study of the Bible.[25] These students are insistent that their faith in God is pertinent to their everyday lives as students.[26] They state that it is relevant to all aspects of their lives, and affects their value decisions in areas such as interpersonal relationships, honesty in taking examinations, attitudes towards sex and marriage, responding to parents and others in authority, the choice of a career, and so on.[27] They believe the Bible literally as to the atoning death and bodily resurrection of Jesus Christ, and believe that the "answers to life's ultimate questions rest with Jesus Christ and the Bible."[28] At

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21. A. 27.

22. *Ibid.* During this time, the University did not have "full knowledge" of the religious activities which University officials later held to be in violation of the regulation in question. A. 27.

23. *E.g.*, Matthew 28:18-20; Acts of the Apostles 1:8; Luke 19:10; John 20:21 (King James Version)

24. *E.g.*, II Timothy 3:14-17 (King James Version)

25. *E.g.*, Hebrews 10:25 (King James Version) "Evangelicalism stresses the Reformation doctrine of salvation solely by faith in Jesus Christ. It has frequently implied acceptance of the literal truth of the Gospels and a personal experience of Jesus Christ as Lord and Savior" *Encyclopedia Americana*, Vol. 10, Evangelicalism (1978 ed.) p. 715.

26. A. 17.

27. *Ibid.*

28. A. 18.

the heart of their strong convictions is a missionary and evangelistic purpose to "promote a knowledge and awareness of Jesus Christ *on the campus*" (emphasis added), and therefore they seek to attract the uninvolved and uncommitted student to their meetings.[29]

Over the years since their formation as a campus organization, the Cornerstone students have met at different times for small group Bible studies, and have also held larger weekly meetings which included Bible study and teaching, prayer, informal sharing and singing.[30] The group has never sought nor received any official university promotion, assistance, or sponsorship from administration or faculty, the group's activities and thrust having been entirely autonomous and self-directed.[31]

In January, 1977, as they had customarily done at the beginning of each semester, the Cornerstone students submitted a request for the use of a classroom in a university building for the purpose of a regular Saturday night meeting.[32] On this occasion, instead of approving the request as in the past, the administration requested more information on the activities to be conducted at the meeting.[33] It is undisputed that the activities conducted at the meeting are religious in nature, that many of the students have an attitude of worship, and that belief in Jesus Christ as God is openly advocated.[34] After receiving a straightforward description of the meetings, the University concluded that such meetings would violate the reg-

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29. A. 17.
30. A. 34.
31. A. 18.
32. A. 27, 30-31.
33. A. 27.
34. A. 33-35.

ulation prohibiting religious teaching and religious worship, and therefore denied the request.[35] A short time later, these students requested permission to have a small group Bible study of approximately 20 students on the lawn of the University grounds.[36] Again permission was denied, with the regulation discussed above being offered as the sole justification for such action.[37] From the denial of these requests until the regulation was invalidated by the Eighth Circuit Court of Appeals in August, 1980, the students involved in Cornerstone were not permitted to meet on campus for religious purposes.[38] They were not permitted to hold small group Bible Studies or to hold their larger weekly meetings on the campus.[39] During this period of time, the students were forced to move their meetings off campus with disadvantageous effects, including a loss of visibility and identity as a campus organization; increased confusion; decreased comfort and decreased ability to attract interested visitors; lack of convenience; the fact that their message was made to seem more remote and less relevant to the typical student; and a decrease in attendance.[40]

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35. A. 27.

36. A. 21.

37. A. 22. Interestingly, the students were initially advised that they could hold the Bible study provided they promised to present "all possible views of the Bible fairly, and not talk about just one view of the Bible." A. 21.

38. 18. Following the decision of the Eighth Circuit Court of Appeals, the University regulation was reluctantly suspended under threat of additional legal action. Petitioners' Brief, p. 9.

39. *Ibid.* The regulation has also been enforced so as to prohibit Bible studies in the University Center cafeteria. When the students attempted in February, 1980, to hold a Bible study in the cafeteria, their attorney was advised by the University that any regular meetings to "study the Bible" are "within the purview of Judge Collinson's [the District Court Judge] opinion and the University regulation . . . ." Letter from Ted D. Ayres to James M. Smart, Jr., dated February 13, 1980.

40. A. 18-19.

The District Court held that the regulation was required by the Establishment Clause.[41] The Court of Appeals, noting that religious speech, and the right to associate for the advancement of religious beliefs, are protected by the First Amendment, unanimously[42] reversed the District Court decision. The Eighth Circuit held that the Establishment Clause did *not* require such a regulation as the one in question. The court further held:

> In contrast with a neutral policy, UMKC's current regulation has the primary effect of inhibiting religion, an effect which violates the Establishment Clause just as does governmental advancement of religion. . . The University's policy singles out and stigmatizes certain religious activity and, in consequence, discredits its religious groups.[43]

Finally, a word about what this case is *not* about. The case does not involve an off-campus group unrelated to the University trying to use the facilities at the University. Nor does the case involve any transfer of funds either from the public treasury of the State of Missouri, from the public treasury of the United States, from the Student Activities budget, or from anywhere else. The case does not involve faculty or administration sponsorship of any religious meetings, since the University encourages, and the Cornerstone students engage in, "self-directed activity."[44]

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41. Opinion, Appendix to Petition for Writ of Certiorari, at A. 47.

42. Two of the Eighth Circuit Judges dissented from the denial of rehearing. A. 21-24, Appendix to Petition for Certiorari (635 F.2d 1320-22).

43. Opinion, Appendix to Petition for Writ of Certiorari, at A. 14.

44. A. 39. The University is careful to point out that it does not approve or sponsor the aims or purposes of any special interest group, stating that:

(Continued on following page)

The case does not involve any disruption or interference with the academic purposes or atmosphere of the University.[45] Nor does the case involve an effort by these students to obtain any greater accommodation for the meetings of their special interest group than that provided for other special interest groups on campus. Rather, this case simply involves the right of these religiously motivated students to use the buildings and grounds of the University, just like the students in other special interest groups, on an equal basis, without favoritism or opposition from the administration, so that they may pursue their own special interest, and attempt to communicate their message to all who are willing to attend and listen.

Footnote continued—

> The University shall not be used for commercial or promotional advertising purposes, nor will the name of the University be identified in any way with the aims, policies, programs, products, or opinions of any organization or its members, but an exception may be made by the Board of Curators upon the recommendation of the president of the University. When an exception is made, the conditions for using the name will be prescribed. 1980-81 *Student Handbook*. UMKC, p. 25.

45. The record is silent as to any such disruption. It is not without significance that during the years Cornerstone did meet on campus, the University officials did not have "full knowledge" of the religious teaching and religious worship occuring at such meetings. A. 27. Moreover, the record is silent as to any problems or difficulties encountered by any universities which permit religious activities on campus, such as the University of Minnesota and the University of California. According to a study completed in 1978, approximately 43 per cent of tax supported universities have policies that allow recognition of student religious groups on campus. Although the data was not specific as to this issue, apparently most of the universities granting official recognition to religious groups also permit the groups to have access to university facilities for religious activities. Walls, W. J., *University Provisions for the Practice of Religion: Update 1978*, Doctoral dissertation, Ball State University, 1978. See also Jones, *The Public University and Religious Practice: An Inquiry into University Provision for Campus Religious Life* (Ball State University, 1973) (published monograph), for a more general description of the entire range of policies related to accommodation of student religious activity at both public and private universities.

SUMMARY OF THE ARGUMENT

1. The University's prohibition against religious teaching and religious worship directly burdens rights of free speech, association, and exercise of religion, and therefore can be justified only by a compelling state interest of sufficient constitutional value to override all of the freedoms in question.

2. The Establishment Clause provides no justification for the regulation because the religious expression in question is that of private individuals in a public forum. A neutral policy of accommodating all viewpoints in a public forum does not constitute governmental sponsorship or favoritism of any of the viewpoints expressed in the public forum.

3. There is no financial support to religion provided by a refusal to discriminate against religious speech and activities in a public forum. Any benefit to religion from such a policy is simply incidental to the University's purpose in encouraging personal intercommunication and a free exchange of ideas.

4. The Missouri Constitutional provisions say nothing about the use of public property on an equal basis by religious groups, and therefore cannot be used as a justification for the policy. Even if the Missouri Constitution did express such a concern, the provision would have to be invalidated in the face of the fundamental First Amendment interests burdened by the regulation.

5. Instead of being required by the Establishment Clause, the University's regulation violates the Establishment Clause because its primary effect is opposition, hostility, and invidious discrimination against traditional religious expression.

ARGUMENT

I.

THE REGULATION VIOLATES THE STUDENTS' RIGHT OF EQUAL ACCESS TO A PUBLIC FORUM PROTECTED BY THE FIRST AND FOURTEENTH AMENDMENTS.

A. The Regulation Imposes an Illegal Content-Based Restriction Against a Particular Category of Speech in a Public Forum.

The University of Missouri, like other public universities in this country, is a place where students are told that they are permitted and encouraged to think, to examine, to discuss, to evaluate, to test, to challenge, and to prove all kinds of values, viewpoints, philosophies, and ideas.

UMKC also seeks to accommodate the non-academic needs of the special interest groups, small as well as large, within the 11,000 member university community, recognizing that the university "must also be responsive to the various ethnic and non-academic special interest groups within the university."[46] Access to meeting rooms is controlled by established administrative procedures[47] in order to provide for orderliness, but the university makes no pretense at restricting the content of the discussions and ac-

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46. A. 43. For the sake of convenience, the petitioners (the dean of students and individual members of the Board of Curators) will be referred to herein as "the University."

47. The student organizations may make application for regular use of space, or may apply for one-time use. Regular use of space is apparently granted for a maximum period of one semester at a time. In addition to the right of recognized student organizations to meet on campus, there is also provision for "ad hoc" groups of students to meet, provided the chancellor evaluates and approves their request. 1980-81 *Student Handbook*, p. 25.

tivities at the proposed meetings of the recognized student organizations, with one exception: the absolute prohibition against religious teaching and worship.

There can be no question that the university has created what is, for constitutional law purposes, a "public forum" in its program promoting special interest group activities. The Eighth Circuit had no difficulty finding that the University had "created an open forum for the activities of its recognized student groups."[48]

This Court has, in the last two decades, clearly set forth the doctrine that once the state has opened a forum for some purposes, the forum may not be denied to other groups or individuals solely on the basis of the subject matter of their proposed discussions. This concept is noted in *Cox v. Louisiana*, 379 U.S. 536 (1965), where the Court struck down a practice which gave discretion to local police to approve or reject proposed demonstrations according to their subject matter. The concept was more distinctly articulated in *Police Department v. Mosley*, 408 U.S. 92 (1972), where the Court held unconstitutional an ordinance which permitted labor picketing in a certain location, but not picketing with regard to other matters. Striking down the ordinance under the Equal Protection Clause, the court stated:

> "There is an 'equality of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on con-

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48. Opinion at A. 11 of Appendix to Petition for Certiorari; 635 F. 2d at 1310, 1316.

tent alone, and may not be justified by reference to content alone." 408 U.S. 96.

Healy v. James, 408 U.S. 169 (1972), decided the same day as *Mosley*, certainly made clear that speech and associational activities of student special interest groups enjoy a full measure of First Amendment protection. Actually, a case decided three years earlier is even more in point with regard to the fact that the Equal Protection Clause protects the rights of university students to be free from government restrictions discriminating against religious content. In that case, *Stacy v. Williams*, 306 F. Supp. 963 (N.D. Miss. 1969), a three judge court struck down a number of regulations of the University of Mississippi dealing with invitations to outside speakers. One of the regulations provided that "facilities of the University shall not be made available for public religious meetings . . ." The Court struck down the regulation stating:

> ". . . as this regulation can reasonably be construed to mean that no student religious group may invite outside speakers on religious topics which prohibition would conflict with the Equal Protection Clause, it must be rejected . . ." 306 F. Supp. at 975-96.

The doctrine of "equal access to a public forum" is a doctrine rooted in both the Free Speech Clause of the First Amendment and in the Equal Protection Clause of the Fourteenth Amendment.[49] The range of the expression which must be accommodated in a public forum is identical to the range of the protection afforded by the Free Speech Clause. In other words, if the speech is constitutionally protected speech, it cannot be excluded from the forum on the basis of any asserted interest applicable to the

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49. See generally Karst, *Equality as a Central Principle in the First Amendment*, 43 U. Chi. L. Rev. 20 (1975).

subject matter.[50] Here, if we compare the student activities meetings to streets and parks,[51] where communication is somewhat infrequent and often incidental, or to airports and bus terminals,[52] where people go primarily for transportation and rarely for communication, the conclusion is inescapable that the University has created a forum for the expression of ideas and for intercommunication between students.

In this case, the University of Missouri has adopted and enforced a regulation which directly, and firmly, discriminates against religious speech and exercise. The University must bear the burden of justifying the content-based restriction by clearly demonstrating that the prohibited expression is not protected by the Equal Protection Clause, the Free Speech Clause, or by the Free Exercise Clause. Certainly there is no allegation that the speech proposed by these devout students is unprotected by virtue of being obscene, defamatory, disorderly, fraudulent, or

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50. In spite of the very broad language of *Mosley*, we do not contend that *anything* can be said in a public forum, as the Chief Justice pointed out in his concurring opinion in *Mosley*. Some have argued for an even broader interpretation of the "public forum" concept—that *no* discrimination on the basis of subject matter should be tolerated. See Kalven, *Upon Reading Mr. Justice Black on the First Amendment*, 14 U.C.L.A. Law Rev. 428 (1967). See also Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 Sup. Ct. Rev. 1. We do not find it necessary to make such an argument, nor do we believe that to be the law. However, we do submit that a public forum is simply a place where any content restriction will be presumptively invalid if it affects any form of speech which is ordinarily protected speech, and that the government will have the burden of showing that the speech in question is somehow not protected by the First Amendment.

51. *Hague v. C.I.O.*, 307 U.S. 496, 515 (1939); *Fowler v. Rhode Island*, 345 U.S. 67 (1953).

52. *Wolin v. New York Port Authority*, 392 F. 2d 83, 89 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968); *ISKCON v. Griffin*, 437 F. Supp. 666 (W.D. Pa. 1977); Stone, *Fora Americana: Speech in Public Places*, 1974 Sup. Ct. Rev. 233.

that it comes within any other category of speech by private individuals which has been ruled to be unprotected. The justification for the restriction, according to the university, is wholly derived from the federal Establishment Clause and the Missouri policy of strict separation of church and state. If the University does not sustain its heavy burden in this Court of demonstrating that this speech is *not* protected speech, then this case is clearly and easily controlled by *Healy* and *Mosley*, and the regulation must be struck down.

B. The Free Speech Clause Protects the Voluntary, Non-Official Religious Speech of Private Individuals.

At stake in this case is nothing less than the question of the degree of esteem that we, as a people, place upon free exercise of religion, and, indirectly, the degree of esteem we place upon the role of religion in our society. For what the University really argues is that religious speech by private (non-official) individuals is entitled to less protection than speech on secular subjects.[53]

Why does the University seek to exclude the Free Speech Clause from the analysis? Clearly, the restriction on religious speech is easier to justify if free speech considerations are excluded. Free speech carries with it certain concomitant rights not ordinarily associated with free exercise, including the right to hear and the right to know.[54] If these concepts can be ignored, and the

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53. The District Court accepted this argument, concluding that "secular intellectual liberties" were entitled to a higher degree of protection than "religious activity" 480 F. Supp. 907, at 918.

54. The right to associate for the advancement of beliefs is actually *both* a free speech right and a free exercise right. See *Keegan v. University of Delaware*, 349 A. 2d 14 (Del. 1975),

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focus placed on *religion* rather than on *speech*, then the only concern is the degree to which the exercise of the students' religion is burdened. Then the University can restrict its analysis to showing a compelling state interest which it claims to be of greater weight—in particular, the interest in nonestablishment of religion. If, however, in addition to the burden on religious exercise, the regulation inhibits rights of the students to speak, to hear, to know, and to associate for the advancement of their beliefs, in addition to burdening the right to the free exercise of their religion, then the University must demonstrate a state interest of sufficient weight to override the total constitutional value of all of the individual freedoms restricted by the regulation. Moreover, some of the lower courts have had a tendency to find that the religious exercise of the students is not constitutionally burdened if they can engage in their religious practices off the campus[55]. But in speech cases, this Court has found immaterial the fact that the speech could be exercised elsewhere.[56]

Footnote continued—

cert. denied, 424 U.S. 934 (1976), *reh. denied*, 425 U.S. 945 (1976); *Niemotko v. Maryland*, 340 U.S. 268 (1951); *Kunz v. New York*, 340 U.S. 290 (1951) at 293. The student's right to hear and his right of academic freedom (also derived from the Free Speech Clause) include his right to explore religious ideas and experiences. See Gianella, *Religious Liberty, Nonestablishment, and Doctrinal Development, Part II*, 81 Harv. L. Rev. 513, 581-587 (1968).

55. *E.g.*, *Chess v. Widmar*, 480 F. Supp. 907 (W.D. Mo. 1979), *rev'd*, 635 F. 2d 1310 (8th Cir. 1980); *Dittman v. Western Washington University*, ... F. Supp. ....., Cause No. 79-1189V (W.D. Wa. 1980) (appeal docketed, 9th Cir., No. 70-3120, Apr. 7, 1980). *Contra*, *Keegan v. University of Delaware*, 349 A. 2d 14 (Del. 1975), *cert. denied*, 424 U.S. 934, *reh. denied*, 425 U.S. 945 (1976).

56. The regulation is not a "time, place, and manner" restriction. It is a total exclusion from one forum based on content. The fact that the students can hold religious meetings elsewhere is immaterial. *Schneider v. State (Town of Irvington)*, 308 U.S. 147, 163 (1939); *Healy v. James*, 408 U.S. 169 (1972).

For these reasons, it is significant to the analysis to determine whether the religious speech in this case is protected by the Free Speech Clause as well as the Free Exercise Clause.

The result of the University's view is that the protection afforded the right of the students to advocate a religious point of view on campus is reduced *below* the protection afforded their right to advocate radical politics or a homosexual lifestyle. In fact, the freedom to advocate belief in God is reduced far below the freedom to advocate atheism or agnosticism.[57] The argument is, of course, that the Constitution does not forbid aid to groups advocating secular viewpoints,[58] but that the Constitution does forbid aid to any group advocating a religious viewpoint. Therefore, it is "just too bad" about those religious students! Even though they, too, have enrolled in the University and have paid their student activity fees, and even though the University has taken care to see that all other extracurricular and cocurricular needs will not go unmet, they cannot even be permitted to sit on the lawn to study their Bibles!

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57. Although this Court has applied a broad definition of "religion" for free exercise purposes in cases much as *Torcaso v. Watkins*, 367 U.S. 488 (1961), and although the Third Circuit has gone some distance in that direction in *Malnak v. Yogi*, 440 F. Supp. 1284, 1319 (D. N.J. 1977), *aff'd per curiam*, 592 F. 2d 197 (3d Cir. 1979) (holding teaching of TM in the schools to be a violation of the Establishment Clause), it is unlikely that the University would adopt and attempt to enforce a very broad definition of religion for purposes of this regulation. It is unthinkable that any attempt to do so would be successful without causing a major uprising and a flurry of litigation. As a practical matter, the "freedom of anti-religion" on the campus is virtually absolute.

58. The validity of this contention is analyzed in Section III below.

1. History shows that private, non-official religious speech was intended by the drafters of the Bill of Rights to enjoy as much constitutional protection as speech on other matters.

As a people, even considering our many different social, ethnic, cultural, and religious backgrounds, we have always felt that the pursuit of religion and religious concepts is among the loftiest and noblest of all pursuits.[59] We have always believed that one of the chief duties of government is to *protect* our right to discuss religion, to explore religious concepts, and to respond to the dictates of our own conscience in practicing those beliefs.[60] The framers of the First Amendment uniformly endorsed the value and importance of the pursuit of religious questions and concerns, however they might have individually defined their religious beliefs.[61]

Conditions to day are different from those at the time of the First Amendment, but we cannot ignore the basic

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59. ". . . [T]he relations which exist between man and his Maker, and the duties resulting from those relations, are the most interesting and important to every human being, and the most incumbent on his study and investigation." 19 *The Writings of Thomas Jefferson* (Memorial edition 1904), p. 414.

60. *Engel v. Vitale*, 370 U.S. 421 (1962) (opinion of Justice Black); *Abington School District v. Schempp*, 374 U.S. 203, 305 (1963) (Goldberg and Harlan, JJ., concurring).

61. The third article of the 1780 Massachusetts Declaration of Rights expressed some of the prevailing sentiment of that day: "the happiness of a people, and the good order and preservation of civil government, essentially depend upon piety, religion, and morality . . ." Swindler, *Sources and Documents of U.S. Constitutions*, Vol. 5 (Oceana 1973). Thomas Jefferson, regarded as a strict proponent of nonestablishment and author of the "wall of separation" concept, proposed accommodation of sectarian "instruction" and "worship" for interested students within the "precincts" of the University of Virginia. 19 *The Writings of Thomas Jefferson* (Memorial ed. 1904) 449, quoted in *McCollum v. Board of Education*, 33 U.S. 203, 245 (1948) (Reed, J., dissenting).

human values underlying the amendment, which clearly place a high regard on the role of religion. Any argument that religious speech is not entitled to the same degree of protection as other speech fails to take into account the realities of history.

2. The decisions of this Court establish that private religious speech enjoys as much protection as any other speech.

In 1939, in a case involving religious canvassing by a Jehovah's Witness who refused for religious reasons to obtain a permit which was required for any kind of canvassing, this Court, applying a free speech analysis, invalidated the regulation. *Schneider v. State (Town of Irvington)*, 308 U.S. 147. The next year, in the landmark decision of *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (incorporating the free exercise clause into the Fourteenth Amendment) the Court reversed a breach-of-the-peace conviction of another Jehovah's Witness minister, noting that "the fundamental law declares the interest of the United States that the free exercise of religion be not prohibited *and* that freedom to communicate information and opinion be not abridged."[62] (emphasis added). In other words, the Court again used both the Free Exercise Clause and the Free Speech Clause to invalidate the action of the State.

In many other cases since then, the Court has struck down restrictions against religious speech without ever considering the possibility that private, non-official religious speech is protected *only* by the Free Exercise Clause, and

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62. The Court, commenting on *Cantwell*, has confirmed that that case also "invoked interests protected by the First Amendment's guarantee of *freedom of speech*." *Village of Schaumburg v. Citizens for a Better Environment*, ... U.S. ....., 100 S. Ct. 826, 831-832 (1980). (emphasis added).

not also by the Free Speech Clause.[63] *E.g., Murdock v. Pennsylvania,* 319 U.S. 105 (1943) (ordinance requiring religious colporteurs to pay a license tax struck down); *Tucker v. Texas,* 326 U.S. 517 (1946) (Jehovah's Witness minister going door to door presenting religious views and literature—prosecution under statute held to infringe freedom of religion *and* freedom of the press); *Marsh v. Alabama,* 326 U.S. 501 (1946) (same facts as *Tucker,* except town privately owned); *Saia v. New York,* 334 U.S. 558 (1948) (restriction on use of sound amplification device challenged by religious group and invalidated as a "prior restraint"), *Kunz v. New York,* 340 U.S. 290 (1951) (law requiring a permit to hold a religious meeting on the streets invalidated); *Niemotko v. Maryland,* 340 U.S. 268 (1951) (refusal to grant permission for "Bible talks" in public park held a prior restraint and a denial of equal protection). In *NAACP v. Alabama,* 357 U.S. 449 (1958), this Court, discussing the freedom to associate for the advancement of beliefs, stated: "[o]f course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, *religious* or cultural matters . . . 357 U.S. at 460-461. (emphasis added). And with regard to the use of public property for religious speech, the Court has stated:

> "In considering the right of a municipality to control the use of public streets *for the expression of religious views,* we start with the words of Mr. Justice Roberts that 'wherever the title of streets and parks may rest,

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63. The right *not* to express a view has been protected on free speech grounds also, even though the refusal to express the mandated sentiment was based *strictly* on religious convictions. *West Virginia v. Barnette,* 319 U.S. 624 (1943) (requirement that school children join in flag salute ceremony); *Wooley v. Maynard,* 430 U.S. 701, 97 S. Ct. 1428 (1977) (requirement of bearing state motto "Live Free or Die" on license plate held unconstitutional).

they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of *assembly, communicating* thoughts between citizens, and *discussing* public questions.' " (citing *Hague v. C.I.O.*, 307 U.S. 496 (1939)). *Kunz v. New York, supra,* at 293. (emphasis added).

"[T]here is no constitutional bar to the use of government property for religious purposes. On the contrary, this Court has consistently held that the *discriminatory barring of religious groups from public property is itself a violation of First and Fourteenth Amendment guarantees. Abington School District v. Schempp,* 374 U.S. 203, 314 (1963) (Stewart, J., dissenting) (emphasis added).

"Government may not interfere with efforts to proselyte or worship in public places." *McDaniel v. Paty,* 435 U.S. 618, 640 (1978) (Brennan, J., concurring).

Since the Court has regarded religious speech as also enjoying the protection of the Free Speech Clause, it follows that the Court has also seen fit to use the Equal Protection Clause to invalidate restrictions against religious speech in public places. *Niemotko v. Maryland,* 340 U.S. 268 (1951); *Fowler v. Rhode Island,* 345 U.S. 67 (1953) (Frankfurter, J., concurring). In view of the foregoing, it seems fair to say that, if the Free Speech Clause and the Equal Protection Clause do not afford the highest degree of protection to private (non-official) religious speech, it will come as a very definite surprise to this Court![64]

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64. A number of other courts have also recognized that free speech and free exercise go hand in hand when we are talking about speech with religious content. *O'Hair v. Andrus,* 613 F. 2d 931 (D.C. Cir. 1979) (the court refused to interfere

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3. The key distinction is between governmental speech and speech by private individuals.

The Establishment Clause was aimed at keeping the government from exercising any jurisdiction over matters of religion.[65] It had nothing to do with rights of communication between citizens, which were protected by the Free Speech and Free Press Clauses, as well as the Free Exercise Clause. Therefore, to the extent that the Establishment Clause was directed at speech at all, it was directed at official, governmental speech, not the non-official speech of private individuals.

In order to protect minority religious viewpoints consistent with the value of the Establishment Clause, this Court has, on occasion, found it necessary to invalidate governmental religious expression. The problem in *Abington Township School District v. Schempp*, and *Engel v. Vitale*, was not that *someone* was reading the Bible, or praying, on school property. The problem was *who* was doing it. What troubled this Court in those cases was that when a teacher stands in front of a class and follows *the directives of State law* as to a prayer or Bible reading, the whole authority and prestige of the State is placed behind the message. The Court found that the result is

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Footnote continued—

with the Pope's service and sermon on the National Mall, basing the decision on both free speech and free exercise grounds); *Stacy v. Williams*, 306 F. Supp. 963 (N.D. Miss. 1969) (striking down, on equal protection grounds, restriction on religious speakers on campus); *Love v. Mayor*, 448 F. Supp. 128 (D. Wyo. 1978) (restriction on solicitation applied to religious activity without distinguishing it from other activity protected by the First Amendment); to the same effect are *Levers v. City of Tullahoma*, 446 F. Supp. 884 (E.D. Tenn. 1978); *Tate v. Akers*, 409 F. Supp. 978 (D. Wyo. 1976), *aff'd*, 565 F. 2d 1166 (10th Cir. 1977).

65. *Everson v. Board of Education*, 330 U.S. 1, 28 (1947); *Engel v. Vitale*, 370 U.S. 421 (1962).

a degree of sponsorship and coercion which was deemed incompatible with the purposes of the Establishment Clause. In practical effect, the Court found the State in those cases to be promoting religion.

A helpful illustration of the difference between official and non-official speech is presented in *O'Hair v. Paine*, 312 F. Supp. 434 (W.D. Tex. 1969), *aff'd per curiam*, 432 F. 2d 66 (5th Cir. 1970), *cert. denied*, 401 U.S. 955 (1971). In that case, Madalyn O'Hair sought an injunction on Establishment Clause grounds against the National Aeronautics and Space Administration to restrain NASA from permitting the astronauts to engage in religious commentary during the Apollo flights. The court rejected the contention that the Establishment Clause required such a restriction, noting that NASA was not promoting or sponsoring such comments, and that the astronauts were simply relating their personal views in their capacity as private individuals. Since there was no attempt by NASA to sponsor such statements, and since the astronauts were not regarded as speaking *officially*, there was no governmental approval or sponsorship, and no basis for invoking the Establishment Clause.

We do not deny that the Establishment Clause can be invoked against private speech under some circumstances, but that will be true only in rare cases where the government has sponsored, promoted, and involved itself with the private speech by affirmative acts constituting favoritism or support of religion. If the government has taken such affirmative steps, then it is fair to restrict the private speech because of the governmental involvement. But if the government has taken no affirmative steps (as in *O'Hair v. Paine, supra*), then there can be no logical or just basis for restricting private speech. Thus, a minister preaching a sermon to passers-by

on the steps of City Hall, operating without an invitation from city officials, and receiving only the same accommodation as all other speakers on all other topics, presents a very different picture for constitutional purposes from that of a minister *being singly invited* by city officials to preach a sermon on the steps. An example of a case where the Court found a prohibited level of governmental sponsorship and involvement is *McCollum v. Board of Education*, 33 U.S. 203 (1948). In that case, a school board affirmatively agreed with an inter-faith council to provide religious instruction periods in the classrooms during regular class time, to be taught by outside religious instructors approved by the superintendent of schools. Those not wishing to participate were permitted to go elsewhere for secular instruction. Although the religion teachers were not employed by the school board, the Court found the arrangement to be such that it was practically the same as if the religious instruction was conducted by the school board itself.[66]

McCollum, therefore, is more like our example of the minister *being singly invited* to preach a sermon on the steps of City Hall. The case before this Court now, however, is more like the situation where a minister simply seeks to avail himself of facilities already available and already used for many other expressive activities.

Assume for a moment that instead of arranging for religious instruction in the schools in *McCollum*, the school

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66. It is overly simplistic to assert that the difference between the "released time" program approved in *Zorach v. Clauson*, 343 U.S. 306 (1952), and the program disapproved in *McCollum* was the physical location of the instruction *per se*. It is true that the physical location was significant, but it was primarily because of the effect that the physical location had on the young students' perception of *who was sponsoring the instruction*. The Court also found it inappropriate to use tax-supported property for this instruction, but the Court would not have been so concerned if the programs had been a "public forum" of "self-directed" activity. See discussion as to the financial support element of the Establishment Clause in Section III below.

board had simply set aside an hour for the students to engage in unsupervised "self-directed activity" of any kind. Let us assume that among the things the students engage in are discussions of sports, politics, religion and atheism. Now, let us assume Mrs. McCollum brings her suit, claiming the Establishment Clause is violated because some of the students advocate belief in God. What is the result? She loses—it is private, non-official speech, and there are no governmental actions attempting to promote or sponsor religious activity—the school is just accommodating the students in whatever they want to do, on the assumption that personal interaction among students has value in itself. This Court and other courts are very sensitive to official government actions of favoritism toward religion. *E.g., Stone v. Graham,* 101 S. Ct. 192 (1980) (legislature required posting of Ten Commandments in classroom). But in this case, the students are not asking for any favoritism or sponsorship—all they desire is equal accommodation.

C. The Regulation Violates the Students' Right to Speak, Right to Hear, and Right to Associate for the Advancement of Their Beliefs.

In this case, students were notified that religious content in student meetings was prohibited—at least certain kinds of religious content—and they were denied the use of the buildings and the grounds. If they had decided, in spite of such denial of permission, to hold a Bible study in violation of the University's regulation, they would have subjected themselves to disciplinary penalties which could have affected their entire future.[67]

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67. In response to a question from the students' attorney regarding the applicability of disciplinary sanctions to students violating the regulation in question, the University replied that "normal University procedures relating to violations would be pursued with regard to Cornerstone." Letter of Ted D. Ayres to James M. Smart, Jr., dated March 31, 1980.

The regulation restricts the rights of the students to discuss religious concepts with one another, revealing a remarkable indifference to the essential value of discussion and intercommunication among students. *Tinker v. Des Moines School District*, 393 U.S. 503, 512, (1969).

The regulation also restricts the right to hear, a right which has been recognized as being at the core of the Free Speech Clause.[68] Students attending a public university have a right to be exposed to religious ideas and religious activities as well as all other ideas and activities which compete for their attention and allegiance. The "equality of status in the field of ideas" mandates that there be no restriction on the right of students to explore religion as well as non-religion. Here, the regulation affects not only the rights of the student interested in religion, but also the rights of the irreligious and the skeptical. Thus, the regulation ignores the possibility that certain students may wish to attend the Cornerstone meetings in order to challenge certain concepts, or to voice disapproval, or even, perhaps, to do research for a term paper on the sociology of university religious groups. It is manifest that the University could not order removal from the library of all Bibles and materials dealing with religious concepts, merely for the purpose of suppressing study of religious matters.[69]

In all the cases involving freedom of expression and freedom of association on the university campus, it has been

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68. *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965); *Thomas v. Collins*, 323 U.S. 516, 534 (1945); *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943); *Brooks v. Auburn University*, 296 F. Supp. 188, 192, 199 (M.D. Ala. 1969); *James v. Nelson*, 349 F. Supp. 1061 (N.D. Ill. 1972).

69. See, generally, *Developments—Academic Freedom*, 81 Harv. L. Rev. 1045 (1968); Monypenny, *Toward a Standard for Student Academic Freedom*, 28 Law and Contemp. Probs. 625 (1963).

of no avail to the universities to argue that the students could meet off-campus.[70] There are good reasons why so little weight is given to such an argument: (1) the courts are also concerned with the rights of the other students (students not already participating) to have access to the meetings if they desire, and (2) often the purposes of a group include not only discussion among themselves, but also, as in this case, a desire to communicate their message to the skeptical and the uncommitted. "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. State (Town of Irvington)*, 308 U.S. 147, 163 (1939). Nor is it permissible to argue that if students are interested enough to hear the message, they will gladly go off-campus to attend a meeting. The government may not abridge freedom of speech just because those desiring to hear the message could receive the message by some other means. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 757, n. 15 (1976), (striking down a statute banning the advertising by a pharmacist of the prices of prescription drugs); *Healy v. James, supra.* Thus, the fact that students interested in religious concepts can find churches off-campus is immaterial to their right to engage in their own meetings and discussion on campus.

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70. *E.g., Healy v. James, supra; Gay Students Organization v. Bonner*, 509 F. 2d 652 (1st Cir. 1974); *Stacy v. Williams*, 306 F. Supp. 963 (N.D. Miss. 1969); *Keegan v. University of Delaware, supra.* In *Healy*, the Court noted that not being able to meet on campus was the most significant aspect of the policy. *Id.* at 176.

II.

THE REGULATION PLACES A DIRECT BURDEN ON THE STUDENTS' FREE EXERCISE OF THEIR RELIGION.

In the 1976 case involving the University of Delaware, the Supreme Court of Delaware held that the free exercise rights of the students desiring to attend a Catholic mass on campus were constitutionally burdened by a University policy which would not permit religious worship services in the common area of the dormitories. *Keegan v. University of Delaware,* 349 A. 2d 14, *cert. denied,* 424 U.S. 934 (1976). The court stated:

> The only activity proscribed by the regulation is worship regardless of whether one considers the proscription a direct or indirect burden on student activity. The commons area is already provided for student use and there is no request here that separate religious facilities be established. The area in question is a residence hall where students naturally assemble with their friends for many purposes, religion, at least in part, is historically a communal exercise. 349 A. 2d at 17.
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> * * *
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> We conclude that the regulation involved here has, in this factual context, both the purpose and the effect of impeding the observance of religion and thus constitutes a legal burden on the students' constitutional right to freely exercise their religion. 349 A. 2d at 19.

In this case, as has been noted, the religion of the Cornerstone students commands them to worship[71] and to study

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71. See scriptural references in footnotes 24 and 25 *supra.*

together.[72] Moreover, in this case there is at least one additional religious duty infringed by the regulation: the duty of evangelism. The duty of evangelism carries some special significance for our analysis in that, whereas the practice of their religion does not require that they worship God or study the teachings of the Bible *in any particular place*, the religious duty of evangelism is one which *must be* directly connected geographically with the campus.

For these students, evangelism on the campus is not an option, or a preference—it is an imperative, based upon Biblical commands.[73] It is not sufficient to argue that they can do their evangelism downtown, away from the campus. They have the right to gear their evangelism to the most likely prospects—their friends and peers—the ones who sit beside them in class. Therefore, the stated purpose of their group has always been "to promote a knowledge of Jesus Christ among students."[74] As one of the student leaders stated it:

> "Our purpose as a group is to promote a knowledge and awareness of Jesus Christ on the campus, and also, of course, to encourage one another in the faith

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72. See scriptural references in footnote 23 *supra*.

73. While it is true that Christians generally do not believe that a failure to be active in evangelism will cause the loss of their eternal salvation, it is almost universally regarded as a matter of obedience to the will of God, and to His scriptural commands. It is believed that obedience will result in the blessing of God, in one's own personal growth in relationship to Him, and in a great sense of fulfillment. Evangelical Christians uniformly believe that every person (except for children under "the age of accountability") must personally exercise faith in Jesus Christ as the sin-bearing Savior, and that, before that faith can be exercised, the individual must hear the message. "Evangelism . . . is the Church's primary task." Statement of Dr. John McKay, former president, Princeton Theological Seminary, quoted in A.S. Wood, *Evangelism —Its Theology and Practice* (Zondervan 1966) p. 10.

74. Exhibit B to Stipulation of Fact, A. 30.

> and to grow in the grace and knowledge of the Lord Jesus Christ. To carry out these objectives we must meet together, provide a forum for our message, and have a place for interested students to meet with us."[75]

Consequently, this case is somewhat different from *Keegan* in that we are not talking about simply the *convenience* of being able to attend religious activities on campus as opposed to having to go off-campus. No, we are also talking about a mission of *communication* to other students —a mission which requires visibility *on the campus*. One of the most popular forms of religious evangelism throughout the ages has been the invitation to attend a religious meeting.[76] In this case, any evangelism by means of a religious meeting is expressly prohibited, and, therefore, the exercise of evangelism is directly burdened.

Moreover, in this case the burden goes beyond the simple fact of not being able to meet on campus where interested prospects can be most likely attracted. If the religious meeting to which a student is invited is *not* on the campus, when *every other* student activity *is* on the campus, then there is a natural tendency to regard the religious meeting as something which is irrelevant to the realities of student life. When and if a visitor does make his way to the meeting off-campus, he encounters a meeting in the living and dining rooms of a small house, where students are jammed together and many cannot even see the speaker.[77] The point is that, because every other student activity is accommodated on the campus, the *comparison* resulting from the unjustified discrimination against religion puts religion at a relative disadvantage.

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75. A. 27.

76. *E.g., Martin v. City of Struthers*, 319 U.S. 141 (1943).

77. A. 18-19.

Accommodation of all groups preserves State neutrality, without endorsing a group's purpose as relevant; but excluding religious groups directly stigmatizes and burdens their activities.

As one of the Cornerstone students put it:

> "This leads to the kind of thinking which holds that religion is obsolete and has nothing to do with the realities of life. *This type of thinking is a large barrier to the effectiveness of our message and the purposes of our group*" (affidavit at A. 19) (emphasis added).

This Court has unmistakably declared its solicitous protection for the free exercise of religion where such exercise does not conflict with a governmental objective of overriding importance. *Sherbert v. Verner*, 374 U.S. 398 (1963) (unlawful to deny unemployment benefits to Sabbatarian unable to secure employment because of Sabbath observance); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (Amish could not be forced to comply with compulsory education after eighth grade where it conflicted with the free exercise of their religious beliefs); *Thomas v. Review Board*, No. 79-952, 490 U.S.L.W. 4341 (U.S., Apr. 6, 1981) (Jehovah's Witness could not be denied unemployment benefits where unemployment resulted from religious convictions concerning construction of military tanks). This Court has declared that free exercise rights may be constitutionally burdened only as necessary to avoid "the gravest abuses, endangering paramount interests." *Sherbert, supra*, at 406 (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945)). As stated by the Court in *Yoder*,

> "[t]he essence of all that has been said and written on the subject is that only those *interests of the highest order* can overbalance legitimate claims to the free exercise of religion." (emphasis added). 406 U.S. at 215.

Also at issue is the right to associate for the advancement of beliefs. In this case, that right is both a free exercise right and a free speech right. *NAACP v. Alabama*, 357 U.S. 449, 460-461 (1958); *Kunz v. New York*, 340 U.S. 290, 293 (1951). And this right, in reality, is the one most directly attacked by the University in its regulation prohibiting "groups" from meeting for religious purposes.[78]

Here, the burden placed on the free exercise rights is a direct one. It is *at least* as direct as the burdens faced by the Amish in *Yoder* and by the Sabbatarians in *Sherbert*, and by the Jehovah's Witness in *Thomas*. Hardly anything is more fundamental and basic to an evangelical Christian than the rights being suppressed here, as we have already noted. And in order to exercise those rights, the students would have had to subject themselves to the possibility of punishment.[79] Even worse than the possibility of punishment, however, was the risk of further damage to the credibility of their message that would likely have resulted from any confrontation with the administration. It is difficult for a non-religious, non-evangelistic person to understand why a religious person would insist on having the right to meet on campus. Therefore, the religious person who violates the University's rules and is dismissed or prosecuted as a troublemaker is viewed by the news media and in informal discussions as a misguided neurotic who enjoys persecution. Consequently, religious students desiring to speak a credible message and to live a credible

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78. It is not clear what a "group" is for purposes of the regulation. There is nothing to indicate that it has to be any particular size, so presumably two people discussing religion in the lounge of the University Center could be a "group," in the discretion of the University administrator. This would leave him with discretion like that struck down in *Niemotko v. Maryland*, 340 U.S. 268 (1951), and *Cox v. Louisiana*, 379 U.S. 536 (1965).

79. See footnote 74.

lifestyle find themselves in a cruel dilemma: keep the meetings off campus with all the attendant disadvantages, or violate university restrictions and end up in a confrontation that could further impair the credibility and respectability of the group, and therefore, of the message.

The District Court found that the interests protected by the Establishment Clause outweighed the freedoms burdened by the regulation. The Court of Appeals readjusted the scales by a different view of the liberties protected and a different understanding of the aims and scope of the Establishment Clause. Thus, the Eighth Circuit rightly found no conflict between the Establishment Clause and the Free Exercise Clause in this case.[80] That finding was correct, as discussed in more detail in Section III. But even if a conflict were found, it is clear that the free exercise claims would take precedence, since the underlying purpose of the Establishment Clause was to protect freedom of religion (not freedom *from* religion). *Sherbert, supra,* at 409-10; *Yoder, supra,* at 234, n. 22; Tribe, *American Constitutional Law,* pp. 819-823 (1978).

III.

THERE IS NO COMPELLING GOVERNMENTAL INTEREST WHICH JUSTIFIES A REFUSAL TO ACCOMMODATE THE SPEECH, ASSOCIATION, AND RELIGIOUS EXERCISE RIGHTS OF THE STUDENTS.

Having established that the regulation burdens the First Amendment rights of speech, assembly and free exercise

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80. In fact, the Eighth Circuit found that because of the regulation's unjustified hostility to religion, the Establishment Clause weight did not belong on the governmental side of the scale at all, but instead belonged on the same side as all of the freedoms in question. In short, the Eighth Circuit found no justification at all for the regulation.

of religion, we turn now to the most critical question of the case: whether these restrictions can be justified by the Establishment Clause or by the Missouri Constitution. If such restrictions are required by the Establishment Clause as the District Court concluded, then every public university in this country must prohibit religious activities on campus.[81] If such restrictions are not required by the Establishment Clause, but are required by the Missouri Constitution, then universities in states with similar constitutional provisions will be required to adopt and enforce such policies, if they do not already have them. Moreover, states such as Missouri may have to rethink their policies with regard to religious activities at public parks and state hospitals, since there are no clear boundary lines to the arguments used to justify the regulation in this case.

However, the University has not shown that either the Missouri or the Federal Constitution requires such a provision, nor can such a showing be made.

A. A Policy of Accommodating Voluntary Religious Speech and Activity in a Public Forum Does Not Violate the Establishment Clause.

This Court has stated that the Establishment Clause provides no rigid, mechanical formula by which to evaluate all forms of government involvement with religion. *Walz v. Tax Commission*, 397 U.S. 664, 668 (1969).

The objective of the Establishment Clause, as the Court has frequently noted, was to *protect freedom of religion*. *Engel v. Vitale*, 370 U.S. 421 (1962) at 432; *McDaniel v. Paty*, 435 U.S. 618 (1978) at 642 (Brennan and Marshall, JJ., concurring).

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81. A substantial percentage of public universities permit religious activities on campus on an equal basis with other activities. See footnote 45.

Thus, while the Court has utilized the tripartite test as a convenient tool of analysis in many cases, and while the Court has also at times examined legislation in the light of the principles of voluntarism and neutrality underlying the Religion Clauses, nevertheless the Court has never intended to abandon common sense and the illustrations of history as guides in the matter. *Meek v. Pittenger*, 421 U.S. 349 (1975).

In this case, regardless of the method of analysis, all of the criteria employed by the Court in the past indicate that a neutral policy of permitting all kinds of expression and activities on campus would in no way violate the Establishment Clause.[82]

The University chooses the frequently-employed tripartite test as the basis for its analysis, relying upon the "primary effect" test, concluding that the test mandates the restrictions here imposed because a neutral policy which *fails to discriminate* against religion will cause an aura of implied approval by the state, and because such a policy would constitute financial assistance to the religious purposes of the group.

The University's argument as to primary effect overlooks a simple common sense question: how can a policy of accommodating *all* viewpoints be said to have a primary effect of advancing *one particular* viewpoint? Nowhere does the University come to grips with this issue, nor does the University even acknowledge that such a question might have relevance to this inquiry. This bypassing of basic reasoning is troubling enough in itself to cast serious doubt on the validity of the University's contentions. But

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82. See the excellent discussion in Toms and Whitehead, *The Religious Student in Public Education: Resolving a Constitutional Dilemma*, 27 Emory L.J. 3 (1978).

any vestige of credibility which remains is destroyed by closer examination of the arguments in the light of sound reasoning and actual precedent.

1. The "aura of approval" does not exist—but if it does, the aura can be removed without abridging fundamental rights.

The University's contention that allowing religious activities on campus would cause an appearance of sponsorship is questionable. As the D. C. Circuit stated in *O'Hair v. Andrus* with regard to a similar contention:

> "When the National Mall is, as a matter of established policy, openly available on a non-discriminatory basis to the Pope, to the Reverend Moon, to Madalyn Murray O'Hair and to *all* others (religionists and anti-religionists) there is no Establishment of a religion" and *there cannot be a meaningful perception of one.* 613 F. 2d at 934 (emphasis added).

In our case, the facilities on campus are available for a film about "Sri Chimnoy, Indian Spiritual Master",[83] and are also available for Transcendental Meditation,[84] and for Betty Friedan to speak on "The Future Dream of Human-

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83. See footnote 10, *supra.*

84. *The University News,* Vol. 15, #18 (February 9, 1978), announced the scheduling of events for the Transcendental Meditation program. The lectures, films, and sessions were sponsored by the Students International Meditation Society on UMKC. The sessions were held in the University Center, according to the article. *The University News,* Vol. 17, #4 (September, 1979), also carried an advertisement inviting students to a "free introductory program about Guru Maharadji and the Knowledge he reveals," again held on campus in the University Center. A picture of the guru carries a caption, "I'll give you that incredible Knowledge that you have been looking for all your life." Transcendental Meditation was held to be religious in *Malnak v. Yogi,* 440 F. Supp. 1284 (D. N.J. 1977) *aff'd per curiam,* 592 F. 2d 197 (3d Cir. 1979).

ism".[85] They are also, of course, available to Madalyn Murray O'Hair, to an atheist club, a Communist club, and any other ideological group which denies the existence of God. Consequently, it seems unlikely that any student of sound reasoning would conclude that the University has any purpose in mind other than the accommodation of many viewpoints and opportunities.

But even if there were an aura of approval toward religion, the University, in avoiding that aura, would have a duty to use measures designed to have the least restrictive impact on the freedoms in question. If the harm feared could be averted by further communication, governmental suppression will be found unconstitutional. *Linmark Associates, Inc. v. Township of Willingboro*, 97 S. Ct. 1614 (1977) (town could not prohibit the posting of real estate "for sale" signs to avoid panic selling where it could use counter-publicity in effort to forestall "white flight."). Here, signs can be posted, announcements can be made in the University catalogs and student handbooks, and there are probably many other ways to avoid an appearance of approval.[86] *Allen v. Morton*, 495 F. 2d 65, 67, 90-91 (D.C. Cir. 1973).

2. There is no impermissible financial assistance to religion provided by a neutral policy allowing access of all viewpoints to a public forum.

The University also argues that the "primary effect" test would be violated by allowing religious meetings on

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85. *The Kansas City Star*, April 5, 1981, carried an article indicating that Ms. Friedan, well-known humanist author and lecturer, was to deliver a public message of the stated title in the University Center on April 15, 1981.

86. As noted, footnote 44, the University has already published the fact that it does not endorse or sponsor the viewpoint or activities of any special interest group.

campus because expenditures for maintenance, heating, and lighting, accrue to the benefit of any religious group which uses the facilities. To put this argument in perspective, let us consider the fact that the record makes clear that these buildings are going to be there, open, available, heated, lighted, and maintained, regardless of whether students are permitted to meet for religious purposes. The students in this case do not ask the University to construct for them a building, or even to set aside a room, for their exclusive use. Therefore, it is obvious that, whether we are talking about the lawn or the buildings, we are talking about a situation which is analogous to the use of a public park. It is true that the use of a public park or public university property for religious activity does provide a benefit which accrues to the religious activity. But no case has ever held that failure to prohibit religious activities in a public park amounts to a violation of the Establishment Clause. Indeed, many cases have not even recognized that there was such an issue. *Niemotko v. Maryland*, 340 U.S. 268 (1951) ("Bible talks" in public park); *Fowler v. Rhode Island*, 345 U.S. 67 (1953) (minister holding meeting in public park.) Other cases have specifically held the Establishment Clause inapplicable. *E.g., O'Hair v. Andrus, supra.* And in three other cases the courts refused to block religious meetings on the campuses of public universities. *Keegan v. University of Delaware, supra* (common area of dormitory); *Pratt v. Arizona Board of Regents*, 110 Ariz. 466, 520 P. 2d 514 (En Banc 1974) (football stadium); *Stacy v. Williams, supra* (university facilities generally).

Tilton v. Richardson, 403 U.S. 672 (1971), has no application because what was found offensive in that case was the unconditional grant of 20-year-old buildings of substantial value to the exclusive use and ownership of sec-

tarian institutions. It was not a case involving "equal accommodation" in a public forum. It was very much like a "money grant" case—the type of case which must be scrutinized very closely to avoid establishment problems. Moreover, in *Tilton*, there were no free speech or free exercise interests to offset against the Establishment Clause interests. The case was analyzed strictly on the basis of the Establishment Clause.

The recent case of *Gilfillan v. Philadelphia*, 637 F. 2d 924 (3d Cir. 1980) provides a helpful illustration for our analysis. In that case, the Catholic Diocese had arranged for the Pope to conduct a religious service at the city's Logan Circle. In addition, the city had agreed to construct a large platform for the exclusive purpose of this religious service. The plaintiffs in that case did not even challenge the fact that city property was made available for this service, but they did challenge the city's involvement in constructing this platform *solely for this service* at taxpayer expense. In that case, it was rightly held that tax revenues could not be used for the construction of the platform. In this case, the Cornerstone students are not seeking any special accommodation, or favoritism. They do not want any special facilities constructed at taxpayer expense for their exclusive use. All they ask is the same opportunity to use the existing facilities that all of the other special interest groups have.

If allowing religion in university facilities constitutes "financial aid" to religion, then the accommodation of the Young Socialists and the Gay Liberation meetings must constitute "financial aid" to their purposes. Under the Due Process Clause, however, the government may not employ tax revenues for other than a "public purpose."

Citizens Savings and Loan v. Topeka, 20 Wall. 655, 664, 22 L. Ed. 455, 461 (U.S. 1975).[87]

Would the University choose to argue that the Due Process Clause forbids any student activities on University property, because the University would thereby be "financially aiding" the viewpoint of some groups which might have a purpose contrary to firmly established public policy? Or would the University contend that the student activities programs should be censored so that viewpoints conflicting with public policy could be excluded? That issue has already been decided. *Healy v. James, supra.* No, the correct analysis would recognize that a forum for the expression of viewpoints and exchange of ideas has legitimate value in itself, regardless of the viewpoints expressed in that forum. Therefore, there is no financial aid to any purpose except the purpose of promoting intercommunication and the accommodation of the needs and interests of the students.

In actuality, the only benefit accorded to religion would be, at most, incidental—like the aid to religion resulting from the broadcasted comments of the Apollo astronauts challenged in *O'Hair v. Paine, supra.* Therefore, a policy of neutral accommodation of all viewpoints would certainly be even less offensive to the Establishment Clause than the benefit afforded religious groups by the property tax exemptions upheld in *Walz v. Tax Commission*, 397 U.S. 664 (1969). In that case, the Court looked first at the legislative purpose of such exemptions, and noted that there was no legislative intent to establish

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87. This doctrine was employed in *Everson v. Board of Education*, 330 U.S. 1 (1947), by the plaintiffs in their challenge to the use of tax revenues for reimbursement of the cost of bus transportation for children attending school. While finding the doctrine not applicable in that case (because helping children get to school was a valid public purpose) the Court nevertheless acknowledged the validity of the doctrine.

religion. The Court next noted that the tax exemption created only a minimal and remote involvement between church and state, and that taxation of churches would be more likely to entail excessive entanglement with religion.[88] And, finally, the court noted that freedom from taxation has not tended to lead to an established church or religion and that, on the contrary, it has helped to guarantee the free exercise of all forms of religious belief, which is the real purpose behind the Establishment Clause.

In view of all of the foregoing, it is clear that the Eighth Circuit was correct in finding that the Establishment Clause did not require any restriction on access to campus facilities for student religious meetings. Since the expression of religious values is non-governmental expression, since there is no prohibited financial aid involved and since the only "aid" involved is no greater than the aid to anything else, a neutral policy would not in any sense be a policy "respecting an establishment of religion."

B. Missouri Has No Compelling Interest in Keeping Student Groups From Engaging in Voluntary Religious Speech and Exercise on the University Campus.

Student-Respondents readily acknowledge that Missouri, like other states, has an interest in keeping church and state separate. Student-Respondents are also aware of the fact that several cases indicate that Missouri has a stricter standard with regard to separation of church and state than does the Federal government. What is not at all clear, however, is that the State of Missouri

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88. The entanglement aspects of a policy other than equal accommodation of religious activities are briefly discussed in footnote 96 below.

has any interest at all in prohibiting voluntary student religious activities in the cosmopolitan atmosphere of the state university. The University sets out the detailed provisions of certain constitutional provisions, but fails to indicate how any of those constitutional provisions apply to the facts of this case. Certainly, on their face, not a single one directly applies to the case before us. The one appearing to come the closest is Article I, Section 6, which provides that no one is to be compelled to erect, support, or attend any place or system of worship, or any teacher or clergy thereof. Does the University mean that if a neutral policy of accommodating all groups were in effect, that the University center, and the lawn, would thereby be transformed into a "place or system of worship"? If so, then the University is contending that no religious activities could be permitted to take place on tax supported property, and a constitutional problem is thereby created. What about religious services in state parks, state hospitals, and state penal institutions? What about one-on-one evangelism activities on the grounds of the University, or in a state park? What about someone reading a Bible by himself on state property? Does the University need to go even further and adopt restrictions on private prayer and Bible study? Obviously, applying these provisions to ban all such religious activities on tax supported property would clearly violate free speech and free exercise interests. Therefore, in order to save the Missouri constitutional provisions from invalidation, we must find either that the provisions do not apply as the University has suggested, or that the provisions are not absolute, but are only relative in effect, and must give way to free speech and free exercise interests where those interests are burdened.

Consequently, it seems evident that what the University is defending here is, at best, its own interpretation

of the requirements of the Missouri Constitution.[89] And, in doing so, the University is completely overlooking *other* compelling interests of the State of Missouri. Some of these other interests being overlooked are interests in preserving neutrality and voluntarism in matters of religion, free speech, academic freedom, and the interest in securing for university students the best possible education by allowing exposure to a true plurality of viewpoints, religious and secular, at the state institution.

For many years, universities have permitted religious activities on their grounds. Has it caused any unfavorable or undesirable conditions at those universities? Has it resulted in an establishment of religion at those universities? Or has it simply, as the tax exemptions in *Walz*, served to further guarantee the free exercise of religion and to insure that each religion, whether a minority or a majority view, is entitled to participation in the "marketplace of ideas"?

The true attitude of the State of Missouri is much more in line with the federal approach to establishment issues than the University acknowledges. In 1976, the Missouri Supreme Court, in *Americans United v. Rogers*, 538 S.W. 2d 711, *cert. denied*, 429 U.S. 1029 (1976), upheld a tuition grant program for students attending private colleges and universities, including sectarian colleges. In that case, the Missouri Supreme Court expressly followed the recent United States Supreme Court decision in *Roemer v. Board*

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89. The University's handling of Communiversity (see footnote 10 *supra*) is somewhat puzzling. We have no trouble seeing that Communiversity, which is apparently designed primarily as a service to non-student residents of the general community, is actually a public forum, and the University most probably would agree. We do have trouble understanding, however, how the University can see sponsorship problems with regard to the simple allocation of space to special interest groups on campus, but not with regard to this use of the student activity funds.

of Public Works of Maryland, 426 U.S. 736 (1976), and stated:

> "In doing so [upholding this legislation] we take solace in the fact that the parochial school cases with which this court has dealt in the past involved completely different types of educational entities than the colleges and universities herein involved. As suggested by the proponents: "institutions of higher education are able to boast of academic freedom, institutional independence, objective instruction, lack of indoctrination, faculty autonomy, mature students and a diversity of religious background in faculty and students." 538 S.W.2d at 722.

We also cannot fail to note that there has been no expression of support for the University's regulation issuing forth from the legislature of Missouri,[90] no *amicus* brief filed by the Attorney General, or any other indication of support for the University's rigid interpretation from any other state official purporting to represent the interests of Missourians or Missouri government in general.

Far from opposing voluntary religious activities on the University Campus, the State of Missouri quite probably looks on in wonderment at the tenacity of the University in attempting to defend its regulation which the curators doggedly state "is not open to any other construction."[91]

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90. The Missouri legislature, in fact, appears to be far less impressed by the strictness of the Missouri constitutional provisions than the University is. The State Senate pays $500 per month to a clergyman to offer invocational and benedictional prayers. The House of Representatives has, until recently (following the invalidation of a similar practice in Nebraska) paid each of two clergymen $349 per month for the purpose of offering such prayers. *Church and State*, Vol. 34, No. 5, May 1981, article, p. 20 (116). These policies would seem to be much more in conflict with Article I, Section 6 of the state constitution than simply allowing religious groups equal access to public property.

91. Regulation at A. 29.

C. Even If Missouri Had an Interest in Keeping Religious Speech and Activities Off of University Property, Such Interest Would Be Overridden by the Free Speech and Free Exercise Interests of the Students, Protected by the First and Fourteenth Amendments of the United States Constitution.

As we have noted, it is the duty of government to protect, not to suppress, freedom of religion and freedom of communication. But even if Missouri did have an interest in restricting voluntary religious speech and activities on the public university campus, it is fundamental that the Fourteenth Amendment Due Process Clause would require invalidation of the regulation in this instance. The purpose of the Fourteenth Amendment was to protect the rights of the individual from state policies and laws which infringe fundamental rights, and this Court is not about to allow the State of Missouri to legislate away fundamental freedoms.[92]

IV.

ANY APPROACH OTHER THAN ALLOWING EQUAL ACCOMMODATION FOR STUDENT RELIGIOUS MEETINGS WOULD VIOLATE THE ESTABLISHMENT CLAUSE BECAUSE IT WOULD CONSTITUTE UNJUSTIFIABLE HOSTILITY TO RELIGION.

This Court has long recognized that the Establishment Clause calls for government neutrality in matters of religion, and that government hostility to religion, as well as government sponsorship of religion, can violate the Estab-

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92. The American Jewish Congress candidly acknowledges in its brief *amicus curiae* that, because of conflict with general First Amendment principles, the provisions of the Missouri constitution cannot justify the regulation. p. 16, footnote 3, brief *amicus curiae*.

lishment Clause.[93] Justice Harlan, discussing the goal of proper and acceptable relationships between government and religion, stated in his concurring opinion in *Walz v. Tax Commission*:

> "Two requirements freely articulated and applied in our cases for achieving this goal are 'neutrality' and 'voluntarism.' *E.g.*, see *Abington School Dist. v. Schempp*, 374 U.S. 203, 305 (1963) (Concurring opinion of Mr. Justice Goldberg); *Engel v. Vitale*, 370 U.S. 421 (1962). These related and mutually reinforcing concepts are short-form for saying that the Government must neither legislate to accord benefits that favor religion over non-religion, nor sponsor a particular sect, nor to encourage participation in or abnegation of religion. Mr. Justice Goldberg's concurring opinion in *Abington*, which I joined, set forth these principles: 'the fullest realization of true religious liberty requires that government neither engage in nor compel religious practices, that *it effect no favoritism among sects or between religion and non-religion, and that it work deterrence of no religious belief*'." 374 U.S. at 305. (emphasis added).

As we have seen, refusing to discriminate against religious activities from a public forum certainly does not violate the concepts underlying the Religion Clauses. However, it is equally clear that the University regulation does violate these concepts, since the heavy-handed exclusion of private religious speech from a public forum is one of the evils the Religion Clauses were designed to eliminate.

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93. *Abington School District v. Schempp*, 374 U.S. 203 (1963) at 299 (Brennan, J., concurring); *Epperson v. Arkansas*, 393 U.S. 97 (1968) at 103-104; *Everson v. Board of Education*, 330 U.S. 1 (1947).

The voluntarism requirement, as described by Justice Harlan, is achieved when legislation "neither encourages *nor discourages* participation in religious life." (emphasis added). The principle of voluntarism, in other words, is that people should be free, without governmental inducement or interference, to worship *as* they choose and *if* they choose, and to practice their religion or non-religion as they see fit. Here, the students are not able to exercise that voluntary choice on campus, even though the campus might be their home.[94]

Neutrality, according to Justice Harlan's view, "requires an equal protection mode of analysis." Here, there is no equal treatment. This is, in effect, goverment propagandizing in subtle form—a forum which simply, "under color of law," excludes one group or class of ideas from participation in a vast pluralism. The "freedom of anti-religion" on the campus is absolute, but freedom of religion must fight for its very life!

Another problem, more subtle, is the practical problem of neutrality as *among* religions. Our society today contains many religious and quasi-religious movements which are not immediately identified as religious by university administrators because these movements do not have the labels we traditionally associate with religion. Examples of such movements are eastern mysticism, transcendental meditation, yoga, witchcraft, humanism, and secularism.[95] An administrator is likely to screen out and prohibit a Roman Catholic mass while permitting a meeting where transcendental meditation or eastern mysticism

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94. Van Alstyne, *The Student As University Resident*, 45 Denver L.J. 582 (1968).

95. *Torcaso v. Watkins*, 367 U.S. 488 (1961), footnote 11, at 495; *O'Hair v. Andrus*, 613 F. 2d 931 (D.C. Cir. 1979), footnote 19, at 935. TM has been held to be a religion. *Malnak v. Yogi*, 592 F.2d 197 (3d Cir. 1979). See also *United States v. Seeger*, 380 U.S. 163, 176 (1965).

is taught. With new and different religions and movements appearing regularly in American culture today, a formidable task of censorship is forced upon the University administrator, entangling the university administrator in extremely difficult religious definition and distinction,[96] making it impossible for the university to be truly neutral in practice.[97]

Equal accommodation is the key. The reason that the courts in *Pratt v. Arizona Board of Regents,* 110 Ariz. 466, 520 P. 2d 514 (1974) and *O'Hair v. Andrus,* 613 F. 2d 931 (D.C. Cir. 1979) (McKinnon, concurring) expressed concern about the possible establishment effect of regular religious meetings is because the facilities in question there (the National Mall and Sun Devil Stadium) were not multi-room facilities but rather were forums capable of use by only one large group at a time. Therefore, the jurists were alerted to the danger that a religious group could pre-empt the space from other groups by a long term lease which would exhibit favoritism toward religion, and not neutrality.

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96. The administrator must be able to differentiate between "religious teaching" and "teaching about religion." He also must be able to determine if there is "an atmosphere of worship" at the meeting. The problems of definition and censorship will be even greater in a policy such as that approved in *Dittman v. Western Washington University,* ..... F. Supp. ....., Cause No. 79-1189V (W.D. Wa. 1980) (appeal docketed, 9th Cir., No. 70-3120, Apr. 7, 1980), where the University did not completely prohibit religious activities, but discriminated against those activities by requiring a "fair rental" and limiting the religious meetings to twice per quarter. The *Dittman* formula obviously leads to a quagmire of unresolved questions.

97. The University assumes every religious group will frankly state whether or not their meaning is religious. Just because the Cornerstone students place a high value on integrity does not mean that every other group would be so honest. If the university did not engage in surveillance, only the honest students would be penalized.

The University is capable of devising methods for allocating space that will ensure no pre-emption or favoritism, and presumably has already done so.

CONCLUSION

Thomas Jefferson, an educator as well as a statesman, wrote on October 7, 1822, concerning a plan to allow sectarian religious instruction on the grounds of the University of Virginia:

> Such an arrangement would complete the circle of the useful sciences embraced by this institution, and would fill the chasm now existing, on principles that would leave inviolate the constitutional freedom of religion, the most inalienable and sacred of all human rights, over which the people and authorities of this state, individually and publicly, have ever manifested the most watchful jealousy. . . . 19 *The Writings of Thomas Jefferson* (Memorial edition 1904), pp. 415-417.

Our universities today have become so dedicated to the concept of nonestablishment that we have betrayed the underlying purpose of the Religion Clauses, and have abandoned the "most inalienable and sacred of all human rights" by refusing to accord to religious speech and exercise the same degree of protection we accord to other kinds of expression on the campus. The universities today are teaching young adults that traditional religion and the values contained therein are less than essential—indeed, quite expendable. One concerned educator has stated:

> "The biggest failing in higher education today is that we fall short on exposing students to values. . . . This situation has come about because the modern uni-

> versity . . . [has] essentially turned its back on religion. . . ." (comments of Dr. Steven Muller, President, Johns Hopkins University, reported in *U.S. News and World Report* (Nov. 10, 1980), pp. 57-58.

Frankly, we do not want the University to go so far as to sponsor any religions, or to favor any particular religion, or even to promote religion in general as against anti-religion. However, we do expect *equal accommodation of voluntary student religious activities.* It is one thing to exclude the religious viewpoint from the classroom. It is quite another to kick it off the campus altogether!

Because of the essential value of the fundamental freedoms at stake in this case, and because the Establishment Clause was designed to protect, not to suppress, individual religious freedom, Student-Respondents urge this Court to affirm the well-reasoned decision of the Court of Appeals.

Respectfully submitted,

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